No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

M. Margaret McKeown
(Counsel of Record)
Jeffrey M. Thomas
PERKINS COIE
1201 Third Avenue
40th Floor
Seattle, WA 98101-3099
(206) 583-8888
Attorneys for Petitioner
Jeffery Antoine

QUESTION PRESENTED

Whether the court of appeals erred in rejecting the decisions of other circuits and granting absolute, rather than qualified, immunity for a court reporter, even for conduct in violation of numerous court orders and statutory duties.

TABLE OF CONTENTS

[09901-6601/SL920290.149]

TABLE OF AUTHORITIES

Cases

Statutes

[09901-6601/SL920290.149]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. _____

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. AND SHANNA RUGGENBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jeffery Antoine prays that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the opinion and judgment of that court in Jeffery Antoine v. Byers & Anderson, Inc. and Shanna Ruggenberg.

OPINIONS BELOW

The opinion of the court of appeals is reported at 950 F.2d 1471 and set forth in Appendix A. The order of the district court granting defendants' motion for summary judgment is set forth in Appendix B. The district court's order on rehearing is set forth in Appendix C. A companion case, United States v. Antoine, is reported at 906 F.2d 1379 and set forth in Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1991. The Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

In reaching its decision below, the court of appeals relied in part on the Court Reporter Act, 28 U.S.C. § 753. The pertinent text is set forth in Appendix E.

STATEMENT OF THE CASE

This petition challenges the grant of absolute immunity to a court reporter for gross negligence in failing to produce and deliver a trial transcript in direct violation of her duties under statute and court rule, as well as in direct derogation of numerous express court orders. The

court reporter's blatant disregard of numerous court deadlines and orders resulted in a four-year delay of petitioner Jeffery Antoine's appeal of his criminal conviction and precluded an orderly, proper appeal. Mr. Antoine's efforts to pursue his appeal resulted in a legal Catch-22 in both the criminal and civil systems, in that each in part based its denial of a remedy on the availability of a supposed remedy in the other.

Statement of Facts

During 1986, the United States District Court for the Western District of Washington at Tacoma contracted on an emergency basis with a private court reporting firm, respondent Byers & Anderson, Inc., to provide court reporting services. Under the contract, Byers & Anderson sent one of its court reporters, respondent Shanna Ruggenberg, to serve as the court reporter during Mr. Antoine's two-day criminal jury trial in March 1986.

Mr. Antoine was convicted. He appealed, immediately ordered the transcript of the proceedings from Ms. Ruggenberg and personally paid her $700. The court of appeals ordered the transcript filed by May 29, 1986. Ms. Ruggenberg failed to file the transcript by the deadline and did not request an extension. This initial

failure to meet the filing deadline was followed by more than three years of motions, court orders and hearings directed at obtaining a simple transcript from a two-day trial. The court of appeals set five subsequent filing deadlines. Ms. Ruggenberg repeatedly failed to provide the transcript, request an extension, communicate with counsel, comply with the orders or offer an explanation for her failure.

Ms. Ruggenberg eventually produced a partial transcript. Finally, in July 1988, she stated in an affidavit that she had lost the remaining notes and tapes. In August 1988, the court of appeals ordered the parties to reconstruct the record pursuant to FRAP 10(c). In April 1989, before the reconstruction, Ms. Ruggenberg suddenly discovered additional notes and tapes. Ms. Ruggenberg's counsel delivered them to the district court.

On May 30, 1989, more than three years after Mr. Antoine's criminal trial and his down payment on the transcript, a substitute reporter filed a partially reconstructed substitute transcript. The reconstructed transcript remained defective in that it included no charge to the jury, no transcript of the sentencing, inaudible words or phrases, garbled testimony and insufficient

identification of speakers. The substitute reporter specifically warned she could not "vouch for the completeness or accuracy of the transcript."

Mr. Antoine's criminal appeal was finally argued, after a delay of four years. On July 9, 1990, the Ninth Circuit vacated and partially remanded his criminal conviction to determine whether he was prejudiced by a lack of a total transcript and whether the delay impaired his defense on retrial. The court refused to order an acquittal in part based on the availability of a civil remedy for any due process violation. See United States v. Antoine, 906 F.2d 1379 (9th Cir.), cert. denied, 111 S. Ct. 398 (1990).

Decisions Below

Mr. Antoine filed this action pro se in the district court, claiming federal constitutional violations and state law breach of contract claims. He initially mischaracterized the action as one under 42 U.S.C. § 1983.[1] The court of appeals in the opinion below correctly observed

[1]Just before trial, the district court appointed counsel for Mr. Antoine. Court-appointed counsel corrected the pleading error in an amended complaint, although the motion for leave to file was not granted because the case was dismissed.

that the jurisdictional basis for the original complaint in the district court was federal question jurisdiction under 28 U.S.C. § 1331 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). App. A, 2a. The original mischaracterization did not affect the court's jurisdiction.

The district court granted defendants' motions for summary judgment, finding that because Ms. Ruggenberg's acts and omissions were within her official capacity as a quasi-judicial officer, she was entitled to absolute immunity. The court also found that because the agent, Ms. Ruggenberg, was not liable, the principal, Byers & Anderson, was also free of liability. The court dismissed Mr. Antoine's federal claims and dismissed without prejudice his pendent state law claims.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit held that a court reporter's transcription of the official court record is a part of the judicial function, and therefore insulated by absolute immunity. The court of appeals also held that Ms. Ruggenberg was entitled to absolute immunity for failing to prepare a timely transcript and failing to comply with the Court Reporter Act and

court orders. The court acknowledged the conflict between its holding and that of the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's adoption of an absolute immunity standard for all court reporter functions is at odds with the Court's functional approach to immunity. In recent years the Court has made it quite clear that immunity for public officials is a drastic measure, to be invoked rarely and only after careful scrutiny. Even where officials' challenged acts are extremely important to the function of government, absolute immunity is appropriate only for discretionary functions where there exist overriding considerations of public policy.

The traditional justification for immunity--the protection of independent judicial discretion--is wholly absent here. None of the court reporter's wrongful acts involved decision-making discretion. No evidence suggests that she made any decisions at all; she simply did not act. To the extent she made any "decision," it was to disregard the rules under which she was bound and to blatantly disregard express court orders.

Contrary to traditional justification, the Ninth Circuit's decision below undermines judicial efficiency. The decision permits court reporters to create unwarranted delays in the judicial process and defy their statutory mandate and court orders without responsibility for the consequences.

The record and decisions below are devoid of any overriding public policy considerations. Indeed, providing absolute insulation to a court reporter who acts in direct violation of the law appears at odds with public policy. Although required to do so by the Court, the court of appeals did not find that the challenged function would suffer under threat of litigation. Nor was the there any evidence to support a claim that the challenged conduct was discretionary.

The decision below fails to recognize that qualified, rather than absolute, immunity sufficiently insulates court reporters from unwarranted and vexatious litigation. There is a significant split among the federal circuits on this issue, with the majority holding against absolute immunity. The decision below unreasonably extends the scope of absolute immunity beyond the court reporter's duties.

Whatever arguments may exist for immunizing some aspects of a court reporter's preparation and delivery of trial transcripts, they evaporate when the reporter fails to perform a ministerial function and then blatantly disregards court orders. Acts in derogation of express court orders are not normal "judicial" functions. At most, court reporters are entitled to qualified immunity.

I. THERE IS A CONFLICT AMONG THE CIRCUITS WITH RESPECT TO ABSOLUTE IMMUNITY FOR COURT REPORTERS

The majority of federal circuits that have considered the issue hold that court reporters have qualified, rather than absolute, immunity. The Second, Fifth and Eighth Circuits hold that court reporters are not entitled to absolute immunity. In addition, the Fourth Circuit has indicated in dicta that a court reporter is not entitled to absolute immunity. See McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972). District courts in the Third and Sixth Circuits have also held against absolute immunity. The Seventh and Ninth Circuits hold in favor of absolute immunity.

A. Courts Holding in Favor of Qualified Immunity for Court Reporters

One of the most oft-cited authorities for the denial of absolute immunity to court reporters is the Eighth Circuit's decision in McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974).[2] In McLallen, the court held that absolute immunity does not protect court reporters from a suit for damages for failing to deliver a convicted indigent's transcript within a reasonable time. The Eighth Circuit reaffirmed this qualified immunity holding in two subsequent opinions. Smith v. Tandy, 897 F.2d 355 (8th Cir.), cert. denied, 111 S. Ct. 177 (1990) (court reporter entitled to only qualified immunity from suit arising from alleged omission in criminal defendant's transcript); Holt v. Dunn, 741 F.2d 169 (8th Cir. 1984) (only qualified immunity for court reporters' delay in preparation of criminal defendant's transcript).

Similarly, the Fifth Circuit holds against absolute immunity. In Slavin v. Curry, 574 F.2d 1256, 1265 (5th Cir. 1978), the court held that court reporters are not entitled to absolute

---

[2]In the opinion below, the court of appeals expressly rejected McLallen. App. A, 4a n.4.

immunity for conduct resulting in an inaccurate trial transcript. The same court held in Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981), that a court reporter was protected by only qualified immunity from liability for delays of between nine and twenty-three months of plaintiffs' criminal appeals. The delays resulted from the court reporters' failure to provide requested transcripts. In dicta, the Fourth Circuit also declines to grant a court reporter absolute immunity. See McCray v. Maryland, 456 F.2d at 4.

Courts of the Second Circuit have twice held that court reporters are entitled only to qualified immunity. In Green v. Maraio, 722 F.2d 1013 (2d Cir. 1983), the plaintiff brought a Section 1983 action against a trial judge and court reporter for altering his criminal transcript. The court of appeals upheld the dismissal of the claims on immunity grounds. The court, however, carefully distinguished the judge's absolute immunity and the court reporter's qualified immunity. Id. at 1018-19.

More recently, a district court in the Second Circuit held that court reporters have neither absolute nor qualified immunity for alleged

conduct that resulted in a six-year delay in the plaintiff's criminal appeal. See Mathis v. Bess, 761 F. Supp. 1023 (S.D.N.Y. 1991).

Finally, district courts in the Third and Sixth Circuits have held that a court reporter is not entitled to absolute immunity. See Mourat v. Common Pleas Court, 515 F. Supp. 1074 (E.D. Pa. 1981) (only qualified immunity for an alleged purposefully inaccurate and erroneous transcript); Odom v. Wilson, 517 F. Supp. 474 (S.D. Ohio 1981) (no absolute immunity for court reporters).

B. Circuits Holding in Favor of Absolute Immunity for Court Reporters

Other than the court below, the Seventh Circuit is the only circuit to grant absolute immunity to court reporters.[3] In Scruggs v. Moellering, 870 F.2d 376 (7th Cir.), cert. denied, 493 U.S. 956 (1989), the court held that absolute immunity barred a claim against a court reporter for alleged falsification of the plaintiff's trial transcript. In another case, absolute immunity barred an action arising from two court reporters' alleged participation in a conspiracy to compel

---

[3]The Seventh Circuit frequently takes an expansive view of immunity. See Burns v. Reed, 111 S. Ct. 1934 (1991) and Forrester v. White, 484 U.S. 219 (1988) (reversing Seventh Circuit immunity holdings).

the plaintiff to obtain and pay for unneeded and unnecessary transcripts. Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), cert. denied, 494 U.S. 1085 (1990).

II. THE NINTH CIRCUIT'S DECISION AFFECTS AN IMPORTANT QUESTION OF FEDERAL IMMUNITY LAW AND CONFLICTS WITH THE COURT'S IMMUNITY DECISIONS

Absolute immunity is an extreme measure to be invoked sparingly and with great caution, especially without an express constitutional or statutory basis. Forrester v. White, 484 U.S. 219, 223-24 (1988). Absolute immunity "contravenes the basic tenet that individuals be held accountable for their wrongful conduct." Westfall v. Erwin, 484 U.S. 292, 295 (1988). The Court has succinctly stated that "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy." Forrester, 484 U.S. at 224.

Under Forrester and subsequent cases, courts must adopt a "functional" approach in deciding all absolute immunity questions. This approach seeks to "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . to evaluate the effect that exposure to particular forms of

liability would likely have on the appropriate exercise of those functions." Forrester, 484 U.S. at 224.

Absolute immunity is designed to facilitate independent and impartial adjudication. Id. at 227. The underlying public interest in cases concerning the immunity of judicial officers is maintaining the independence and efficiency of the judicial process. Bradley v. Fisher, 80 U.S. 335, 347-48 (1872). The independence of the judiciary is threatened where potential liability can be used to intimidate judicial officers and induce them to act in a less than objective fashion. Forrester, 484 U.S. at 223. To avoid the unnecessary extension of absolute immunity, the Court recognizes a category of qualified immunity. Id. at 224.

Together, Forrester and Westfall outline a two-step functional test to determine whether an official is entitled to absolute immunity for particular conduct. First, the challenged conduct must be discretionary. If so, then public policy factors must justify absolute immunity.

A. The Ninth Circuit's Failure to Consider Whether the Challenged Conduct Was Discretionary Conflicts With the Court's Requirements

In its opinion below, the court of appeals misreads Forrester and erroneously disregards the threshold determination of discretion required by Westfall. See Westfall, 484 U.S. at 297. Forrester does not abandon the discretion requirement. Discretion is crucial because absolute judicial immunity protects the independence of the judiciary by preserving impartiality. The threat of liability only impairs the judicial process when it endangers the objective exercise of discretion. No one has suggested a lack of judicial impartiality in the circuits that have rejected absolute immunity for court reporters.

Forrester adopted the functional approach to restrict the availability of absolute immunity by focusing on conduct, rather than on the individual seeking immunity. Forrester holds that even where the challenged conduct is discretionary, absolute immunity will not lie unless additionally justified under the functional approach.

In Forrester, the Court denied a state court judge absolute immunity from liability connected with his decision to demote and discharge a probation officer. Whether the conduct was discretionary was never at issue in Forrester. The judge's decision clearly was discretionary. Rather than abandoning the discretion inquiry, Forrester reinforces it by holding that even where conduct is discretionary, absolute immunity is only available for judicial, as opposed to administrative or legislative, functions. Forrester repeatedly refers to the notion that absolute immunity is designed to protect decision making and discretion. The court of appeals erred in refusing to consider under Forrester whether the court reporter's conduct was discretionary rather than ministerial.

As the Court held in Westfall, absolute immunity for nondiscretionary functions is unsupported by the traditional justifications for immunity. 484 U.S. at 297. Only "decision-making discretion" warrants the protection of absolute immunity. Id. Failure by the court below to consider discretion directly contravenes Westfall and Forrester and their underlying policies.

B. The Ninth Circuit Erred in Holding That Court Transcriptions Are Judicial Acts

Although court transcription is an important part of the judicial process, it is a purely

ministerial act that, unlike adjudication, is neither the product of independent judgment nor requires decision-making discretion. McLallen v. Henderson, 492 F.2d 1298, 1300 (8th Cir. 1974). The process is governed entirely by the Court Reporter Act, 28 U.S.C. § 753(b). The task requires the court reporter only to follow established procedures and guidelines. Cf. Westfall, 484 U.S. at 299 (no absolute immunity for acts that only follow established procedures and guidelines). Absolute immunity is not warranted for court reporting.

C. The Ninth Circuit Erred in Holding That Unjustified Delay in Providing a Complete Transcript Is Protected by Absolute Immunity

Whatever the merits of a rule that the quality of a transcription is entitled to absolute immunity, a like rule immunizing a court reporter's violation of court orders is insupportable. The court of appeals below erroneously held that because the Court Reporter Act, 28 U.S.C. § 753(b), required Ms. Ruggenberg to transcribe and certify the record, failure to do so was within her jurisdiction. This conclusion is illogical. In essence, the court is saying that because one is required by law to

perform an act, one is also absolutely immune for refusing to do so.

None of the reasons for absolute immunity supports extending it to an official who refuses to follow express statutory mandates and court orders. Qualified immunity is available for those officials who act within, rather than without, their authority. No overriding public policy supports absolute immunity in these circumstances.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

M. Margaret McKeown

M. Margaret McKeown
(Counsel of Record)
Jeffrey M. Thomas
PERKINS COIE
1201 Third Avenue
40th Floor
Seattle, WA 98101-3099
(206) 583-8888
Attorneys for Petitioner
Jeffery Antoine

March 11, 1992

Blair B. Burroughs, Mills & Cogan, Seattle, Wash., for amicus.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Jeffery Antoine appeals the district court's grant of summary judgment in favor of Byers & Anderson, Inc. and Shanna Ruggenberg. Antoine asserted constitutional claims for violation of due process and access to the courts plus state law claims for breach of contract as a result of Ruggenberg's failure to produce a criminal trial transcript. The district court held that Ruggenberg, a delinquent court reporter, was absolutely immune as a quasi-judicial officer. Byers & Anderson, Ruggenberg's "employer," and Ruggenberg cross-appeal from denial of summary judgment on the issue of whether Ruggenberg was an independent contractor or an employee. We affirm.

I

Byers & Anderson, a court reporting firm in Tacoma, Washington, contracted with the United States District Court for the Western District of Washington to provide court reporting services. As required by the contract, Byers & Anderson sent Shanna Ruggenberg, one of its court reporters, to provide reporting services for the district court. Ruggenberg had provided court reporting services through Byers & Anderson for approximately one and one-half years.

Ruggenberg performed full-time court reporting services for the district court from February 1986 to August 1986. While working in the district court, Ruggenberg spent business hours at the courthouse and contacted Byers & Anderson daily by telephone or in person. To satisfy the requests for overnight transcripts, excerpts of cases, verbatim reports of proceedings, and transcript requests, Ruggenberg was required to transcribe at home in the evenings and on weekends. She was unable to satisfy all of the requests and soon found herself with a backlog of work.

Ruggenberg served on March 3 and 4, 1986, as the court reporter during Jeffery Antoine's jury trial for bank robbery. Antoine appealed his conviction for this crime. Immediately following the trial, on March 20, 1986, Antoine ordered the transcript of proceedings from Ruggenberg. He made a payment of seven hundred dollars on the transcription fee because he was not aware that he could have obtained a transcript without cost due to his inability to pay.

The court ordered the transcript filed by May 29, 1986. Ruggenberg did not meet this deadline, and did not request an extension. For the next three years, Antoine attempted to obtain the transcripts through motions, court orders and hearings. The court set five subsequent filing deadlines for the transcript. Ruggenberg failed to provide the complete transcript, communicate with counsel, or comply with the orders of the court.

Ruggenberg did produce fifty-eight pages of transcript, but she was unable to locate the notes and tapes for the remainder of the proceeding. In July 1988, over two years after the initial transcript request, Ruggenberg claimed in an affidavit that she had lost the remaining notes and tapes. Subsequently, however, in April of 1989, additional notes and tapes were discovered. These items were delivered to the district court, and a substitute reporter attempted to reconstruct the record pursuant to Fed.R.App.P. 10(c).[1] The substitute reporter was unable to complete a full transcript of the criminal proceeding because the notes alone were insufficient to produce an adequate transcript. The reconstructed transcript was deficient in that it included no charge to the jury, no transcript of the sentencing, inaudible words or phrases, garbled testimony, and insufficient identification of speakers.

As a result of his delay in obtaining the partial transcript, Antoine's criminal appeal did not proceed to argument until four years after his conviction. In the underlying criminal action, this court vacated his conviction and remanded. We instructed the district court to determine whether Antoine was prejudiced by his lack of a complete transcript, and whether the delay in obtaining his transcript impaired his defense on retrial. *See United States v. Antoine*, 906 F.2d 1379, 1384 (9th Cir.1990), *cert. denied*, — U.S. —, —, 111 S.Ct. 398, 112 L.Ed.2d 407 (1990). The present status of Antoine's criminal case is unknown.

Antoine filed the present action pursuant to 42 U.S.C. § 1983 (1988). The district court granted Byers & Anderson's and Ruggenberg's motions for summary judgment, holding that Ruggenberg's acts were within her official capacity as a quasi-judicial officer. Summary judgment was denied on Byers & Anderson's assertion that Ruggenberg was an independent contractor and not its employee. The court dismissed Antoine's federal claims and dismissed without prejudice his pendent state law claims.

II

[1] A federal agent acting under authority of purely federal law cannot be held liable under Section 1983.[2] *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir.1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984). Because Ruggenberg was a federal, not state, agent, and because Antoine filed his action pursuant to 42 U.S.C. § 1983, we must first determine whether the district court had jurisdiction to adjudicate his claim. Antoine apparently recognized the problem and sought to amend his complaint to set forth the jurisdictional basis as 28 U.S.C. § 1331 (1988), but the claims were dismissed before the amendment became effective. The district court's summary judgment order disposed of the case as if it were a Section 1983 action.

[2] On appeal, Antoine characterizes his suit as a *Bivens* action. *See* 28 U.S.C. § 1331; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). We follow *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988), and ignore Antoine's initial mischaracterization. In *Mullis*, the action against federal agents was filed as a Section 1983 action instead of as a federal question case. On appeal, this court ignored Mullis' mischaracterization and found jurisdiction in the district court under 28 U.S.C. § 1331. *Mullis*, 828 F.2d at 1387 n. 7. Because immunity in *Bivens* actions is coextensive with immunities recognized in Section 1983 cases, our decision is unaffected by the jurisdictional basis.[3] *See, e.g. Harlow v. Fitzgerald*, 457 U.S. 800, 818 n. 30, 102 S.Ct. 2727, 2738 n.

1. Fed.R.App.P. 10(c) provides: "*Statement on the Evidence of Proceedings When No Report Was Made or When the Transcript Is Unavailable.* If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal."

2. 42 U.S.C. § 1983 (1988) provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. No immunity is expressly provided for in an action brought pursuant to Section 1983. However, Section 1983 was not meant to "abolish wholesale all common-law immunities." *Burns v. Reed*, — U.S. —, 111 S.Ct. 1934, 1938, 114 L.Ed.2d 547 (1991) (quotation omitted). Instead, "this section is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 128 (1976)). A similar analysis is applicable to *Bivens* actions.

1392, 1396 (9th Cir.1988). It is not obvious, as the appellants claim, that the officials should have known their actions were unlawful. Depending on which witnesses the jury chose to believe, it could conclude that the search was carried out in a manner which a competent prison official could have believed was reasonable. The district court therefore did not err in denying appellants' motion for jnov.

IV. Inconsistent Verdicts

Nelson and Osborne argue that even if they are not entitled to jnov, their cases should be remanded for a new trial since the jury findings of Fourth Amendment violations and qualified immunity are irreconcilably inconsistent.

[10] A court reviewing a judgment on allegedly inconsistent verdicts must uphold the judgment if it is possible to reconcile the verdicts on any reasonable theory consistent with the evidence. *Ward v. San Jose*, 948 F.2d 1097, 1103–04 (9th Cir.1991); *Omar v. Sea–Land Service*, 813 F.2d 986, 991 (9th Cir.1987). The consistency of the verdicts "must be considered in light of the judge's instructions to the jury." *Toner v. Lederle Laboratories*, 828 F.2d 510, 512 (9th Cir.1987), *cert. denied* 485 U.S. 942, 108 S.Ct. 1122, 99 L.Ed.2d 282 (1988).

[11] The district court instructed the jury that it could find a Fourth Amendment violation if the search was conducted without "reasonable suspicion to justify the search of that plaintiff." Citing *Anderson*, appellants admit that a finding of a lack of cause is "theoretically reconcilable" with qualified immunity, if the officials reasonably but mistakenly thought they had probable cause. But, they counter, in this case the officials had *no* cause, and so could not have reasonably thought the contrary.

The argument here merely repeats appellants' claims that there was not substantial evidence for a finding of qualified immunity. But where inconsistent verdicts are alleged, the test is not whether there was substantial evidence for the jury's conclusion, but whether it is *possible to reconcile* the verdicts. Here, it is. If the jury concluded that the prison officials thought they had sufficient cause to search, but that the officials were mistaken in that belief, it could find both a Fourth Amendment violation and qualified immunity. *See Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039 ("We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials ... should not be held personally liable.") (citing *Malley v. Briggs*, 475 U.S. 335, 344–45, 106 S.Ct. 1092, 1097–98, 89 L.Ed.2d 271 (1986)).

The district court also instructed the jury that it could find a violation of the Fourth Amendment if the search was conducted in an unreasonable and abusive manner and if the officials acted intentionally or recklessly. We need not reach the question of whether a finding of unreasonable manner of search is consistent with qualified immunity. Since the jury could have found the Fourth Amendment violations on the basis of lack of cause to search, its verdicts are not "irreconcilably inconsistent."

CONCLUSION

Koch's appeal is remanded to the district court to determine whether he filed his appeal in a timely manner. The judgment below is affirmed in all other respects. Each party shall bear its own costs in No. 90-16282. The panel will retain assignment of that case.

AFFIRMED IN PART, REMANDED IN PART.

Jeffery ANTOINE, Plaintiff–Appellant–Cross–Appellee,

v.

BYERS & ANDERSON, INC., Shanna Ruggenberg, Defendants–Appellees–Cross–Appellants.

Nos. 90-35293, 90-35362 and 90-35363.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 11, 1991.

Decided Dec. 13, 1991.

Action was brought against court reporter and court reporting service for failing to provide complete transcript of criminal proceeding, thereby delaying appellate review of the proceeding for over four years. The United States District Court for the Western District of Washington, Robert J. Bryan, J., entered summary judgment for reporter and service, and plaintiff appealed. The Court of Appeals, Trott, Circuit Judge, held that: (1) court reporter was entitled to absolute quasi-judicial immunity, and (2) service was entitled to absolute quasi-judicial immunity.

Affirmed.

1. Civil Rights ⇐206

Federal agent acting under authority of purely federal law cannot be held liable under § 1983. 42 U.S.C.A. § 1983.

2. Federal Courts ⇐641

Mischaracterization of *Bivens* suit against court reporter transcribing federal criminal proceeding as civil rights suit would be ignored on appeal and treated instead as federal question case. 42 U.S.C.A. § 1983; 28 U.S.C.A. § 1331.

3. Federal Courts ⇐776

Court of Appeals reviews de novo district court's grant of summary judgment.

4. Courts ⇐57(1)

Court reporters were entitled to protection of absolute quasi-judicial immunity as matter of law.

5. Judges ⇐36

Judicial immunity is not limited to judges and extends to other government officials who play integral part in implementation of judicial function.

6. Judges ⇐36

Government officials who play integral part in implementation of judicial function enjoy derivative immunity, or quasi-judicial immunity, which can be absolute if their conduct relates to core judicial function.

7. Courts ⇐57(1)

Court reporting activities, being part of adjudicatory function, could receive absolute quasi-judicial immunity.

8. Courts ⇐57(1)

Court reporter's failure to comply with Court Reporter Act or court orders requiring her to produce record did not remove her activities from protection afforded by absolute quasi-judicial immunity. 28 U.S.C.A. § 753.

9. Courts ⇐57(1)

Court reporter's acceptance of fee for transcribing criminal proceedings, although not thereafter earned because no full transcript was prepared, was within jurisdiction of court reporter and did not preclude absolute quasi-judicial immunity.

10. Courts ⇐57(1)

Court reporting service, which employed court reporter either as employee or independent contractor, was entitled to absolute quasi-judicial immunity from liability for reporter's failure to prepare transcript of criminal proceeding where reporter herself was entitled to absolute quasi-judicial immunity.

M. Margaret McKeown and Daniel Laster, Perkins Coie, Seattle, Wash., for plaintiff-appellant-cross-appellee.

Tyna Ek, Merrick, Hofstedt & Lindsey, Seattle, Washington; William P. Fite and Karen J. Feyerherm, Betts, Patterson & Mines, Seattle, Wash., for defendants-appellees-cross-appellants.

the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

28 U.S.C. § 753(b).

There can be no doubt that the making of the official record of a court proceeding by a court reporter is part of the judicial function. That process is inextricably intertwined with the adjudication of claims. The official record reflects evidence taken in the case, the arguments and objections of attorneys, and the ruling of the court. The function of the official record is indispensable to the appellate process. Thus, because the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process, these actions are entitled to absolute quasi-judicial immunity. In this regard, *Mullis* and *Stewart* are unaffected by *Forrester*.[4] Ruggenberg, as a court reporter, is therefore entitled to absolute quasi-judicial immunity for actions in the scope of her authority.

C

We must next determine whether Ruggenberg acted within the scope of her authority in failing to produce Antoine's trial transcript. Absolute immunity will not attach to judicial officers when they act "clearly and completely outside the scope of their jurisdiction." *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir.1986) (citation omitted). In *Mullis*, the court determined that quasi-judicial immunity would attach if the acts complained of were "within the general 'subject matter jurisdiction' of the [quasi-judicial officer] ..." *Mullis*, 828 F.2d at 1390 (citation omitted). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir.1986).

[8] The Court Reporter Act requires Ruggenberg to transcribe criminal proceedings. "The reporter ... designated to produce the record *shall* transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court...." 28 U.S.C. § 753(b) (emphasis added). Ruggenberg was not clearly outside of her jurisdiction in failing to complete the transcript. "Whether an act is judicial 'relate[s] to the nature of the act itself....'" *Ashelman*, 793 F.2d at 1075 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978)). Although Ruggenberg failed to comply with the statute or court orders, Antoine has not shown any action that was not within her responsibilities as a court reporter.

Thus, Ruggenberg is entitled to absolute quasi-judicial immunity despite the impact on Antoine's criminal appeal due to her failure to timely prepare the transcript. "Judicial immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Id.* at 1075 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1872)).

[9] Antoine argues that Ruggenberg's acceptance of the seven hundred dollar payment from him constitutes theft that would preclude absolute immunity from attaching. We disagree. The acceptance of a fee for transcribing the proceedings, although not thereafter earned, is within the jurisdiction of a court reporter and does not preclude absolute immunity. *See New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1304 (9th Cir.1989) (malice or corrupt motive insufficient to deprive a judge of absolute immunity; focus on whether the precise act is a normal judicial function).

D

A party aggrieved by the complete failure of the court reporter to discharge her responsibilities does have remedies. A trial transcript may be reconstructed pursuant to Fed.R.App.P. 10(c), and the Court of Appeals has authority to accord whatever relief might be appropriate pursuant to Fed.R.App.P. 11(b). A district court in the first instance has the power to compel the production of a transcript in the event of a simple delinquency. The final remedy would be to vacate a judgment and remand for a new trial because appellate review was not possible. *See United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir.1989); *United States v. Piascik*, 559 F.2d 545, 547 (9th Cir.1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

The district court did not err in its analysis of alternative remedies. Antoine's criminal appeal was remanded for a finding of whether prejudice had occurred. This was an appropriate remedy under the circumstances of the case. Alternative remedies are available to the private litigant "and to those remedies they must, in such cases, resort." *Forrester*, 484 U.S. at 228, 108 S.Ct. at 544 (quotation omitted).

E

[10] Because Ruggenberg is entitled to absolute quasi-judicial immunity, the district court correctly determined that Byers & Anderson is likewise not liable to Antoine. This is so regardless of Ruggenberg's employment relation with Byers & Anderson.

4. We reject the Eighth Circuit's reasoning in *McLallen v. Henderson*, 492 F.2d 1298 (8th Cir. 1974). In *McLallen*, the duties of a court reporter were held to be ministerial, not discretionary, and thus were not protected by quasi-judicial immunity. *McLallen*, 492 F.2d at 1299–1300. *McLallen*, decided before *Forrester*, fails to consider the judicial function performed by the court reporter, and focuses on the discretion of the actor. We reject this approach and choose instead to focus on the nature of the function performed by the court reporter.

IV

Because we find that Ruggenberg was entitled to absolute quasi-judicial immunity, we need not reach the cross-appeals on the denial of summary judgment.

V

Ruggenberg's actions as a court reporter meet the criteria for the application of the doctrine of absolute quasi-judicial immunity. The function of a court reporter is integral to the efficient operation of the judicial system and, as such, is entitled to derivative judicial immunity. Otherwise, unsuccessful litigants could bring suit against the court reporter in their efforts to redress a perceived wrong. This threat of prospective litigation would hinder the efficient and accurate transcription of judicial proceedings. The district court was correct in holding that Ruggenberg was entitled to absolute quasi-judicial immunity and therefore granting summary judgment.

AFFIRMED.

Marcus S. SMITH, Hildegard U. Smith, Plaintiffs–Appellants,

v.

William MARSHALL, Jr., M.D., Defendant–Appellee.

No. 88–5757.

United States Court of Appeals, Ninth Circuit.

Dec. 18, 1991.

On Remand for the United States Supreme Court.

Before HALL, WIGGINS and THOMPSON, Circuit Judges.

4a

30, 73 L.Ed.2d 396 (1982); *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909–10, 57 L.Ed.2d 895 (1978); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th Cir.1989). We conclude we have jurisdiction to hear this appeal.

III

A

[3] We review de novo the district court's grant of summary judgment. *Price v. Hawaii*, 939 F.2d 702, 706 (9th Cir.1991). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Datagate, Inc. v. Hewlett–Packard Co.*, 941 F.2d 864, 867 (9th Cir.1991). Issues of immunity are reviewed de novo. *Doe v. Atty Gen. of the United States*, 941 F.2d 780, 783 (9th Cir. 1991).

B

[4] Antoine argues that court reporters are not, as a matter of law, entitled to the protection of absolute quasi-judicial immunity. We disagree.

In *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), the Supreme Court confirmed the common law principle that judges have absolute immunity for acts committed within their judicial jurisdiction. The Court described the principle as follows:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.
>
> The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.

Bradley, 80 U.S. (13 Wall.) at 347 (citation omitted).

In elaborating this principle, the Court stated the following with respect to the record of a lawsuit:

> If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Id. at 349.

[5, 6] Judicial immunity is not limited to judges. It extends to other government officials who play an integral part in the implementation of the judicial function. Such officials enjoy derivative immunity (quasi-judicial immunity) which can be absolute if their conduct relates to a core judicial function. *See Mullis*, 828 F.2d at 1388–91 (bankruptcy judge, court clerk, and bankruptcy trustee covered by absolute immunity); *Sharma v. Stevas*, 790 F.2d 1486, 1486 (9th Cir.1986) (clerk of the United States Supreme Court has absolute quasi-judicial immunity because the activities are integral to the judicial process); *Stewart v. Minnick*, 409 F.2d 826, 826 (9th Cir.1969) (court reporters are quasi-judicial officers with regard to acts performed in their designated capacities).

With the decision of the Supreme Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), the analysis of what judicial activities are entitled to quasi-judicial immunity was significantly refined. *Forrester* and subsequent cases confirm that a claim of immunity must be analyzed using a "functional" approach. *See, e.g., Burns*, 111 S.Ct. at 1939; *Forrester*, 484 U.S. at 224, 108 S.Ct. at 542–43; *Westfall v. Erwin*, 484 U.S. 292, 296 n. 3, 108 S.Ct. 580, 583 n. 3, 98 L.Ed.2d 619 (1988). "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544 (emphasis added).

In *Forrester*, the Supreme Court limited absolute judicial immunity to actions that are either "judicial or adjudicative." *Id.* at 229, 108 S.Ct. at 545. By contrast, the *administrative* act of a judge in discharging a court employee was held not to be entitled to the protection of absolute immunity because this function was outside the realm of purely judicial activity. *Id.* The Court decided that although employment and other administrative decisions are crucial to the efficient operation of the judicial system, a judge's performance of these tasks does not bring them within the realm of judicial jurisdiction or make them adjudicative. *Id.* at 230, 108 S.Ct. at 545–46. The Court noted that absolute immunity is designed to facilitate independent and impartial adjudication, *id.* at 227, 108 S.Ct. at 544, but is not meant to insulate judicial officials from all liability for their actions, *id.* at 223, 108 S.Ct. at 542.

[7] Ruggenberg can only receive absolute quasi-judicial immunity if her court reporting activities are part of the adjudicatory function. We conclude that they are.

28 U.S.C. § 753 (1988), known as the Court Reporter Act, gives us the answer to this inquiry. It reads, in relevant part, as follows:

> (b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge.... Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.
>
> The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.
>
> The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to

3a

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY A. ANTOINE,

Plaintiff,

v.

BYERS & ANDERSON, INC., a Washington corporation; and SHANNA RUGGENBERG,

Defendants.

No. C88-260TB

ORDER 1) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; 2) DENYING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE AMENDED COMPLAINT; and 3) ORDER OF DISMISSAL

THIS MATTER comes before the court on Defendant Ruggenberg's Motion for Summary Judgment of Dismissal; Defendant Byers & Anderson's Motion for Summary Judgment; Plaintiff's Motion For Leave to File Amended Complaint; and Plaintiff's Motion for Leave to File Second Amended Complaint. The court has reviewed the pleadings filed in support of and in opposition to these motions,

the file herein, and heard oral argument of counsel on 2 February 1990.

Under Fed. R. Civ. R. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact. T. W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626 (9th Cir. 1987); Celotex Corp. v. Catrett, 477 U.S. 317 (1985). A motion for summary judgment must be granted against a nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The Court must also consider the substantive evidentiary burden that the nonmoving party must meet at trial. T. W. Elec. Service v. Pacific Elec. Contractor, supra at 632.

FACTUAL BACKGROUND

The plaintiff was charged with the offense of bank robbery and a two-day jury trial was held in March, 1986 before U.S. District Judge Jack E. Tanner. Mr. Antoine was convicted, sentenced and incarcerated. He promptly appealed his sentence and conviction. On March 20, 1986, he ordered the transcript of the proceedings from defendant Ruggenberg, and made a deposit of $700.

Thereafter began a series of delays in securing a transcript. On March 4, 1988 the U.S. Court of Appeals for the Ninth Circuit ("9th Circuit") ordered that the transcript was due on April 8,

1988. A partial transcript of 58 pages was filed on June, 1, 1988. Other orders from the 9th Circuit requiring the production of the remaining transcript or an explanation of the delays were ignored by Ms. Ruggenberg. Ultimately, it was learned she had lost her notes of the trial. Ms. Ruggenberg was fined and arrested as part of the 9th Circuit's efforts to obtain this and other transcripts.

On August 29, 1988 the 9th Circuit ordered the parties to reconstruct the record pursuant to Fed. R. App. P. 10(c). Both parties submitted materials, which were filed in January 1989. In April 1989, reporter notes were delivered by Ms. Ruggenberg's counsel to the court and a transcript was produced by another reporter. Mr. Antoine's trial record and transcript has now been certified to the 9th Circuit and a briefing schedule is set for his appeal. Mr. Antoine, in his original complaint, sought specific performance of the contract to produce a transcript of this trial, for which he paid $700, damages for breach of contract, and damages for claimed violations of his constitutional rights to due process and access to the courts pursuant to 42 U.S.C. § 1983.

DISCUSSION

Quasi-judicial immunity is derived from the well-accepted common law doctrine of absolute immunity accorded judges. Imbler v. Pactman, 424 U.S. 409 (1976). The Ninth Circuit has clearly stated that court reporters have quasi-judicial immunity. Stewart

v. Minnick, 409 F.2d 826 (9th Cir. 1969). That court has consistently recognized immunity for quasi-judicial officers when they perform tasks that are an "integral part of the judicial process." Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1390 (9th Cir. 1987) (citing Morrison v. Jones, 607 F.2d 1269, 1273 (9th Cir. 1979), cert. denied, 445 U.S. 962, 100 S. Ct. 1648, 64 L.Ed.2d 237 (1980); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978); Stewart, 409 F.2d 826). In Mullis, the court reasoned that the acts committed by bankruptcy clerks in filing a complaint or petition is a basic and integral part of the judicial process and consequently the clerks qualify for quasi-judicial immunity. 828 F.2d at 1390. In that case, the clerks allegedly failed to carry out their duties. The court concluded that since the acts were within the "'general subject matter jurisdiction' of the bankruptcy clerks" that the clerks had absolute immunity. The court explained that a "mistake or an act in excess of jurisdiction does not abrogate judicial immunity, even if it results in 'grave procedural errors'." Id. (quoting Stump v. Sparkman, 435 U.S. 349, 359, 98 S. Ct. 1099, 1106, 55 L.Ed.2d 331 (1978). The same reasoning would appear to apply to court reporters. See, Stewart, 409 F.2d at 826.

However, a recent U. S. Supreme Court decision draws a clear distinction between administrative and judicial functions as they pertain to the immunity of a judge. Forrester v. White, 484 U.S. 219 (1988). In Forrester, a judge was denied judicial immunity

for the "administrative" act of discharging an employee, even though the Court recognized that such decisions were essential to the very functioning of the courts. The Court was emphatic in its conclusion that it is the nature of the function performed that determines whether judicial immunity attaches. Consequently, the 9th Circuit decisions that hold that even ministerial acts are protected under quasi-judicial immunity may have been overruled by the Forrester decision. See, e.g., Morrison v. Jones, 607 F. 2d 1269 (9th Cir. 1978) (performance of a ministerial duty clothed with quasi-judicial immunity). At least, the Ninth Circuit cases must be examined carefully with Forrester in mind.

Under the pre-Forrester Ninth Circuit analysis, the court reporter would have absolute immunity for two reasons: first, the court reporting function is an integral part of the judicial process; and second, the court reporter, in producing a transcript, was acting within her official capacity as a quasi-judicial officer. Therefore, even though her acts and omissions may, in fact, have been inconsistent with her responsibilities, she is nevertheless absolutely immune from a civil damage suit. See, Mullis, 828 F.2d at 1385.

This result is not altered by the Forrester decision. Although the U.S. Supreme Court made a clear statement that administrative decisions (even when made by a judge) are not protected, the Court did not say that a task, merely because it

can be described as administrative, places it outside the ambit of judicial functions. Obviously, judges perform a number of administrative tasks that are part of the judicial function. Forrester does not limit the doctrine of absolute immunity by excluding any act that could be described as administrative without regard to its relationship to the judicial process. It is the relationship of the act to the judicial function that is crucial under Forrester.

Critical to the Forrester analysis is the question of whether there are adequate remedies available to litigants through ordinary judicial mechanisms. For example, in some situations, where a significant portion of the record is absent, courts have found reversible error. See, United States v. Selva, 559 F.2d 1303 (5th Cir. 1985). In other situations, it is appropriate to vacate a judgment and remand the case for a hearing to determine whether the appellant was prejudiced by the lack of a complete record. See, Brown v. United States, 314 F.2d 293 (9th Cir. 1963); United States v. Piascik, 559 F.2d 545 (9th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). Moreover, the appellate rules provide for relief in situations where a transcript is not produced. Fed. R. App. P. 10(c), 11(b). Under Rule 10(c), the "appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Under Rule 11(b), the Court of Appeals has the authority and discretion to provide whatever relief might be appropriate through the judicial process.

In the situation before the court, unlike the employee fired by the judge in Forrester, appellant has remedies available through the judicial process. Consequently, the act or omission that gives rise to such a judicial remedy is properly described as judicial as opposed to administrative.

Finally, one could argue that granting immunity to a court reporter does not operate to protect the decision-making aspect of the judicial function, but instead protects the ministerial aspects of a court reporter's job. See, e.g., McLallen v. Henderson, 492 F.2d 1298 (8th Cir. 1974). In McLallen, the court explained that the purpose of quasi-judicial immunity is to protect "non-judicial officials who, like judges, must not be unduly inhibited to exercise discretionary authority by the constant fear of personal liability for damages." Id. at 1300. The court reasoned that, since court reporters function in a ministerial capacity, they should not be protected by quasi-judicial immunity. However, neither Forrester nor the 9th Circuit have adopted such a narrow view of quasi-judicial immunity.

Defendant Ruggenberg's acts and omissions were within her official capacity as a quasi-judicial officer. Preparing a transcript is clearly part of the court reporter's job responsibilities, is an integral part of the judicial process, and is part of the judicial function. Therefore, even if the record supports the allegations that Ms. Ruggenberg's acts were improper, or even

malicious, it would not abrogate her immunity. See, Mullis, 828 F.2d at 1388 (citing Stump, 435 U.S. at 356-57, 98 S. Ct. 1099, 1104-05). Her acts are absolutely immune from a civil damage suit.

Mr. Antoine has received the relief provided by the judicial process in that the record was reconstructed pursuant to the Federal Rules of Appellate Procedure, and he finally obtained a copy of his trial transcript. His trial record of his criminal case has been certified for appeal and it will be considered in due course by the 9th Circuit. To this extent, he has not been denied due process or access to the courts. Any damage he has suffered as a result of the delay is prospective and speculative and will not become evident until, and unless, his conviction is reversed on appeal.

Finally, the question of whether Byers & Anderson could be held liable, even though Ms. Ruggenberg has immunity, must be answered in the negative. A principal's liability is solely vicarious. Brink v. Martin, 50 Wash.2d 256 (1957) (citations omitted). Thus, because the agent (Defendant Ruggenberg) is not liable, Byers & Anderson, as principal, is also free of liability.

Therefore, for the foregoing reasons, defendants' motion to dismiss should be granted and plaintiff's claims under 42 U.S.C. § 1983 should be dismissed.

The remaining claim in the original complaint (breach of contract) is based on state law. State law claims may be con-

sidered by a federal court on the exercise of pendant jurisdiction over those claims, whenever the federal and state claims "derive from a common nucleus of operative fact." Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) The plaintiff has filed two motions to amend his complaint to add further state law claims. The first motion seeks to add the claims of gross negligence, common law negligence, negligent hiring and breach of contract against both defendants. The second motion seeks to add the claim of violation of the Washington State Consumer Protection Act against both defendants.

The jurisdictional basis for filing the original complaint in federal court was the federal question raised under 42 U.S.C. § 1983. In light of the foregoing opinion that the § 1983 claim should be dismissed, the remaining case consists of only state law claims. Under the analysis of the Gibbs decision and Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), the case properly belongs in state court. Therefore, the court should dismiss the state law claims, with leave to refile in state court before entry of an order of dismissal of the state claims. Plaintiff's motions to amend his complaint should therefore be denied in this court.

Therefore, for the above stated reasons, it is hereby

ORDERED that Defendants Byers & Anderson and Ruggenberg's Motions for Summary Judgment on the issue of quasi-judicial

immunity are **GRANTED** and plaintiff's claim pursuant to 42 U.S.C. § 1983 is hereby **DISMISSED**; and it is further

ORDERED that Plaintiff's state law claim of breach of contract is hereby **DISMISSED WITHOUT PREJUDICE** effective 16 March 1990. Plaintiff may file the pendent claim in state court, and the effective date of this Order is therefore delayed until 16 March 1990 to facilitate such filing; and it is further

ORDERED that plaintiff's motion for leave to file amended complaint and plaintiff's motion for leave to file second amended complaint are **DENIED without prejudice** to filing in a state court; and it is further

ORDERED that the Clerk of the Court shall enter a judgment of dismissal of this case on March 16, 1990.

The Clerk of the Court is instructed to send uncertified copies of this Order to plaintiff at his last known address and to all counsel of record.

DATED this 16th day of February, 1990.

Robert J. Bryan
Robert J. Bryan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY A. ANTOINE,

Plaintiff,

v.

BYERS & ANDERSON, INC., a Washington corporation; and SHANNA RUGGENBERG,

Defendants.

No. C88-260TB

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

THIS MATTER comes before the court on Plaintiff's Motion for Reconsideration pursuant to Fed. R. Civ. P. 59(e) of the court's order entered on February 16, 1990. The court has reviewed the pleadings filed in support of plaintiff's motion. Plaintiff has not presented any new facts, authority, or argument to cause the court to reconsider its previous Order Granting Defendants' Motion for Summary Judgment.

Therefore, for the above-stated reasons, it is hereby ORDERED that Plaintiff's Motion for Reconsideration is DENIED.

The Clerk of the Court is instructed to send uncertified copies of this Order to plaintiff at his last known address and to all counsel of record.

DATED this 5 day of March, 1990.

Robert J. Bryan
United States District Judge

violations of 18 U.S.C. § 3161(c) (Speedy Trial Act) and 28 U.S.C. § 753(b) (Court Reporter Act), as well as auxiliary constitutional violations. He also alleges a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and an infringement of due process as a result of an unreasonable delay in the processing of his appeal. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part and vacate and remand in part.

I

Antoine was indicted on October 23, 1985, and convicted following a two-day jury trial on March 3–4, 1986. On March 12, Antoine's ex-wife, acting on behalf of Antoine, requested a copy of the reporter's transcript, and paid the full amount necessary to secure it. Despite repeated motions filed by Antoine's counsel and repeated orders entered by the district court directing the transcripts to be prepared, no transcripts had been filed and no explanation had been given by the court reporter as of July 11, 1988. On that date, the reporter finally informed the court that she was unable to locate her trial notes and tapes.

On August 9, 1988, our clerk of court directed the district court to prepare a reconstruction of the trial proceedings pursuant to Fed.R.App.P. 10(c); this order was confirmed in our order dated August 29. On February 16, 1989, Antoine's counsel filed a rule 10(c) statement with the district court, but stated that the 10(c) reconstruction of the record was inadequate. The district judge ordered a hearing for April 29, 1989. In the meantime, portions of the reporter's notes were located. From these, a partial transcript was produced by a substitute court reporter and filed on May 31, 1989. Antoine objected, pointing out numerous omissions and garbled testimony, and moved to vacate his conviction. The district court denied this motion on August 11, 1989, and ordered Antoine to proceed under either the partial transcript or the (concededly inadequate) rule 10(c) reconstruction.

II

[1] Antoine first argues that the government failed to bring him to trial within the time required by the Speedy Trial Act. The district court's factual findings concerning the Speedy Trial Act are reviewed for clear error, and questions of law are reviewed de novo. *United States v. Karsseboom*, 881 F.2d 604, 606 (9th Cir. 1989).

[2, 3] Under the Speedy Trial Act, a defendant's trial "must commence within seventy days of the filing of the indictment or the defendant's initial court appearance," whichever is latest. *United States v. Morales*, 875 F.2d 775, 776 (9th Cir.1989) (*Morales*); 18 U.S.C. § 3161(c)(1). Antoine was indicted on October 23, 1985. The day of the indictment is not included in the calculation. *United States v. Van Brandy*, 726 F.2d 548, 550 (9th Cir.), *cert. denied*, 469 U.S. 839, 105 S.Ct. 139, 83 L.Ed.2d 79 (1984). Thus, the 70-day period started on October 24, 1985. Antoine's trial began on March 3, 1986; 130 days later. However, a number of these days are not counted toward the 70-day requirement of section 3161(c)(1).

Delays due to pretrial motions are excluded from the computation of the 70 days. 18 U.S.C. § 3161(h)(1)(F); *Morales*, 875 F.2d at 776–77. Here, twenty-three days of delay are attributable to pretrial motions. Antoine's counsel filed a motion to withdraw prior to the indictment which was heard on October 30, 1985, thus accounting for seven days. Ten days are attributable to Antoine's motions requesting a pretrial psychiatric examination. Another six days' delay resulted from various motions filed on February 26, 1986, and heard on March 3. Thus, the total delay is reduced to 107 days.

Delays resulting from mental competency examinations are also excluded. 18 U.S.C. § 3161(h)(1)(A). In addition, delay resulting from transporting the defendant to and from the competency examination may be excluded, "except that any time consumed in excess of ten days . . . shall be presumed to be unreasonable." 18 U.S.C. § 3161(h)(1)(H). Antoine's mental competency examination occupied 45 days; transportation to the examination took five days and transportation from the examination consumed in excess of ten days. An additional 60 days may therefore be excluded, reducing the delay to 47 days. Thus, Antoine was brought to trial within the period mandated by the Speedy Trial Act.

Antoine also appears to assert that the delay violated his sixth amendment right to a speedy trial. He cites no cases to support his rather oblique contention nor indeed does he provide any reasoning. Even if we decided we should address this issue, we would conclude that his assertion is without merit.

III

[4] Antoine next argues that his rights under the Court Reporter Act have been violated because he has not received a complete verbatim transcript of his trial. For this reason alone, Antoine urges that we should reverse his conviction. The government does not dispute that Antoine received an incomplete transcript.

"Court reporters are required to record proceedings verbatim, 28 U.S.C. § 753(b), but the failure to do so does not require a per se rule of reversal." *United States v. Doyle*, 786 F.2d 1440, 1442 (9th Cir.), *cert. denied*, 479 U.S. 984, 107 S.Ct. 572, 93 L.Ed.2d 576 (1986). "[E]ven assuming there were omissions in the transcripts, appellant cannot prevail without a showing of specific prejudice." *United States v. Anzalone*, 886 F.2d 229, 232 (9th Cir.1989) (*Anzalone*); *United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir.1990) (*Carrillo*) (reaffirming *Anzalone*'s requirement that defendant show specific prejudice).

> [W]hen a court reporter has failed to record part of the trial proceedings, "[t]he appropriate procedure is to vacate the judgment and remand for a hearing to determine whether appellant was prejudiced by the error in failing to record the arguments. If the trial court concludes that he was, a new trial may be ordered. If the court concludes that he was not, a new final judgment may be entered."

Anzalone, 886 F.2d at 231–32 (emphasis omitted), *quoting United States v. Piascik*, 559 F.2d 545, 547 (9th Cir.1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978).

Antoine argues that because his counsel on appeal is not the same as his trial counsel, prejudice should be assumed and outright reversal is required under *Hardy v. United States*, 375 U.S. 277, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964). We do not read *Hardy* as establishing such a requirement. The Court in *Hardy* stated only that "where counsel on appeal was not counsel at the trial, the requirements placed on him by *Ellis v. United States* [356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958)] . . . will *often* make it seem necessary to him to obtain an entire transcript." *Id.* at 282, 84 S.Ct. at 428 (emphasis added). Thus, the reasoning of *Hardy* indicates only that the substitution of counsel is one significant factor to be considered in determining prejudice. This factor, along with others, may be considered by the district court in the hearing on remand.

We therefore vacate the conviction and remand to the district court to determine whether Antoine can show specific prejudice arising from his lack of a complete transcript. We recognize that our result is inconsistent with a prior ruling of the Fifth Circuit. *See United States v. Selva*, 559 F.2d 1303, 1306 (5th Cir.1977) (requiring automatic reversal where transcript is incomplete and appellant has substitute counsel on appeal). However, because *Selva* is inconsistent with our own precedent which directs a specific prejudice determination on a case-by-case basis, *see Anzalone*, 886 F.2d at 232; *Carrillo*, 902 F.2d at 1410, we do not adopt the *Selva* result.

Antoine once again opaquely alludes to a violation of a constitutional right while asserting his statutory claim. There is no substance to his argument and we reject it. In the next section we do, however, address his due process claim which is not attached to any statutory argument.

The check was dated December 6, 1985, and negotiated on December 23, 1985. There is no evidence of when the check was actually mailed; nor did the Government proffer any evidence as to when Carter received the check. Instead, the Government insisted that Carter had failed to allege facts proving that he received the check before December 8, 1985.

In granting the government's motion, the district court found that "it would have been physically impossible for the Carters to receive the check that would toll the statute of limitations". December 6, 1985, the date of the refund check, apparently was a Friday. December 8, 1985 would therefore have fallen on a Sunday. The court apparently based its statement on the assumption that the check could not have been delivered within one day, or by Saturday, December 7, 1985, and that because there normally is no regular mail delivery on Sundays, the earliest Carter could have received the check was Monday, December 9, 1985.

Because the statute of limitation is an affirmative defense, it was Carter's burden to show that the section 6532(b) limitation period bars the Government's claim. *See* Fed.R.Civ.P. 8(c). Although Carter asserted that defense in both his answer and motion to dismiss, he failed to allege any facts showing that he received the check before December 8, 1985. Instead, he merely raised the erroneous legal argument that the limitation period commenced when the Government mailed the check. The date on which Carter received the check is an essential element of his statute of limitations defense. *See* Fed.R.Civ.P. 8(c). Therefore, because Carter did not make a showing "sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial," *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. at 2552, the district court did not err in granting the Government's motion for summary judgment on the erroneous refund claim.

Carter also contends that even if the burden of proof properly rested on him, the court failed to afford him an adequate opportunity to present evidence to meet this burden. He bases this contention on the court's alleged failure to notify him of the new trial date after the trial was placed on the trailing calendar.

However, the grant or denial of summary judgment is based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits filed in support of or in opposition to the motion, not on evidence adduced at trial. *See* Fed.R.Civ.P. 56(c). Therefore, Carter's contention that he should have been allowed to present evidence at trial lacks merit.

B. Res Judicata

[4] Finally, Carter contends that the court's failure to notify him of the new trial date on the trailing calendar denied him the opportunity to present evidence that his taxes were abated for the 1980 and 1981 tax years in question.

On April 24, 1985, the United States Tax Court entered an order finding the Carters liable for taxes for the tax years 1980 and 1981. We affirmed that decision in *Carter v. Commissioner*, 784 F.2d 1006 (9th Cir. 1986). Carter is therefore bound by *res judicata* and may not relitigate the issue of his liability for taxes in 1980 and 1981. *See Russell v. Commissioner*, 678 F.2d 782, 785 (9th Cir.1982); *Commissioner v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).[5]

The district court did not err in granting summary judgment for the Government.

AFFIRMED.

5. Carter bases his contention that he has no tax liability for the tax years 1980 and 1981 on Notices of Adjustment showing an abatement of his tax liabilities for those years. As the Government notes, the notices indicate that duplicate assessments of Carter's tax liabilities had been entered on both the master and nonmaster files; only the assessments on the nonmaster file were abated.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jeffery ANTOINE, Defendant-Appellant.

No. 86-3073.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 13, 1990.

Decided July 5, 1990.

Defendant was convicted in the United States District Court for the Western District of Washington, Jack E. Tanner, J., of bank robbery. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) Speedy Trial Act was not violated; (2) remand was required for determination of whether defendant's rights under Court Reporter Act were violated; and (3) remand was required for determination of whether delay in processing appeal violated due process.

Affirmed in part, vacated and remanded in part.

1. **Criminal Law ⇐1139, 1158(1)**

District court's factual findings concerning Speedy Trial Act are reviewed for clear error, and questions of law are reviewed de novo. 18 U.S.C.A. § 3161(c).

2. **Criminal Law ⇐577.8**

Day of indictment is not included in calculating time within which defendant must be brought to trial under Speedy Trial Act. 18 U.S.C.A. § 3161(c).

3. **Criminal Law ⇐577.10(8), 577.11(6)**

Defendant was speedily brought to trial under Speedy Trial Act when delays attributable to defendant's pretrial motions and resulting from mental competency examinations were excluded. 18 U.S.C.A. § 3161(c)(1), (h)(1)(A, F, H).

4. **Criminal Law ⇐643, 1166.13**

Failure to provide defendant with complete transcript of trial did not require automatic reversal, even though defense counsel on appeal was not the same as trial counsel; rather than presuming prejudice, substitution of counsel was merely a significant factor to be considered in determining prejudice, and remand was required for determination of whether there was prejudice. 28 U.S.C.A. § 753(b).

5. **Constitutional Law ⇐271**

Extreme delay in processing appeal may amount to violation of due process but due process claim cannot be used as vehicle to implement specific requirements such as those in Speedy Trial Act. U.S.C.A. Const. Amends. 5, 14; 18 U.S.C.A. § 3161(c).

6. **Constitutional Law ⇐271**

In determining whether delay in processing appeal amounts to violation of due process, court considers length of delay, reason for delay, defendant's assertion of his right, and prejudice to defendant. U.S.C.A. Const.Amends. 5, 14.

7. **Criminal Law ⇐1127, 1181.5(3)**

Although three-year delay in processing defendant's appeal was substantial, significant portion of delay resulted from unwillingness or inability of court reporter to produce transcript of trial, and defendant vigorously asserted his right to transcript both before district court and on appeal, record was insufficient to establish whether defendant was prejudiced, necessitating remand on issue of whether delay violated defendant's due process rights. U.S.C.A. Const.Amends. 5, 14.

David Skeen, Port Townsend, Wash., for defendant-appellant.

Robert G. Chadwell, Asst. U.S. Atty., Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before WALLACE, HALL and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Antoine appeals from his conviction for bank robbery, 18 U.S.C. § 2113(a), alleging

we direct the district court on remand to consider Antoine's motion for a new trial based upon an alleged *Brady* violation.

VI

We vacate Antoine's conviction and remand to the district court. On remand, the district court should consider (1) whether Antoine can show specific prejudice in his Court Reporter Act claim arising from his lack of a complete transcript; (2) whether, under his due process claim, Antoine can demonstrate that in the event of a retrial, his defense will be impaired as a result of the delay; and (3) whether Antoine has s[illegible] a valid claim under *Brady*.

RMED IN PART; VACATED AND REMANDED IN PART.

Clifton REDMAN, Plaintiff-Appellant,

v.

COUNTY OF SAN DIEGO; Capt. Richard Beall; Lt. Robert Witcraft; Sgt. Dan Canfield; Deputy Gene Turner, and Does I through XX, Inclusive, Defendants-Appellees.

No. 87-6139.

United States Court of Appeals, Ninth Circuit.

July 11, 1990.

ORDER

Prior report: (9th Cir.) 896 F.2d 362.

Before GOODWIN, Chief Judge, BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, and RYMER, Circuit Judges.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

UNITED STATES of America, Plaintiff-Appellee,

v.

Laurie Jean LUTTRELL, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,

v.

William Dale KEGLEY, aka Bill Kegley, Defendant-Appellant.

Nos. 87-5303, 87-5310.

United States Court of Appeals, Ninth Circuit.

July 12, 1990.

Prior report: (9th Cir.) 889 F.2d 806.

Before GOODWIN, Chief Judge, BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, and RYMER, Circuit Judges.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the

en banc court pursuant to Circuit Rule 35-3.

UNITED STATES of America, Plaintiff-Appellee,

v.

Juan Thomas SUAREZ, Defendant-Appellant.

No. 88-1145.

United States Court of Appeals, Ninth Circuit.

July 25, 1990.

Appeal from the United States District Court for the District of Nevada; Lloyd D. George, District Judge, Presiding.

Before CHAMBERS, CANBY, and NORRIS, Circuit Judges.

SUPPLEMENT TO DISSENTING OPINION OF MAY 16, 1990

CHAMBERS, Circuit Judge, concurring in reversal:

In this case I dissented on May 16, 1990. *U.S. v. Suarez*, 902 F.2d 1466 (9th Cir. 1990). I now change my mind and concur in the result, but on a different ground from the majority.

In my change of mind, I find that I misstated the facts, at least partially.

A closer examination of the record convinces me that the officers of the government felt they had Suarez himself, the keeper of the cache, when they handcuffed him. Maybe they had sufficient facts, but they seem to have failed to prove the point. This leads me to concur in the result.

I thank the parties for calling to our attention, by stipulation, the fact that the scene of the detention was a one-car garage and not a four-car common garage.

Perhaps, in the above, I may have only obscured my point. But here it is again. If the officers had asked Suarez if he was the owner of the van which they had taken away from Gonzales, they would have surely known they were talking to the man they wanted to talk to and whose premises they wanted to search. But, on the record, it might have been possible that the man was a visitor to the premises or even a burglar. I know of no presumption that a man who answers a horn blowing from the outside, without more, is the Lord of the Manor from which he emerges.

I have a hunch that the officers probably asked the man before them if he was Suarez, and that the man before them answered that he was. But the record is bare on this. And, we don't handcuff a man on a hunch and throw him to the ground. Also, I attach some importance to this: The registration slip showed the van to be registered to Juan Suarez at 2815 Stamas Drive, and not 574 Roxella Lane, # C.

I still thoroughly believe most of Suarez's testimony to support his affidavit on the motion to suppress was suspect.* For example, Suarez says in paragraphs 3 and 4 of his affidavit, which is in our record, as follows:

"3. That your affiant did not consent to any search of the premises or any area within said premises located at 574 Roxella Lane, # C, Las Vegas, Nevada, on or about October 7, 1987, by any law enforcement officer;

"4. That your affiant was not advised of his Miranda Rights at any time at the aforementioned premises; that he was read his Miranda Rights for the first time on October 7, 1987, at the office of the Drug Enforcement Agency; that this advisement occurred after your affiant had been transported in custody from the aforementioned premises;"

* Affidavit in Support of Motion to Suppress, filed Nov. 20, 19[illegible] CR-S-282, U.S. District Court for the District of Nevada.

20a

IV

Antoine argues that the [illegible]ee-year delay in processing his appeal amounts to a violation of due process. He therefore urges that his conviction be reversed on this ground.

[5, 6] Courts have recognized that extreme delay in the processing of an appeal may amount to a violation of due process. *Rheuark v. Shaw*, 628 F.2d 297, 302-03 (5th Cir.1980) (*Rheuark*), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir.) (*Johnson*), *cert. denied*, 469 U.S. 1033, 105 S.Ct. 505, 83 L.Ed.2d 396 (1[illegible] We accept this rule in general. We reje[illegible]he idea, however, that a due process claim can be used as a vehicle to implement specific requirements, such as those in the Speedy Trial Act. Indeed, "not every delay in the appeal of a case, even an inordinate one, violates due process." *Rheuark*, 628 F.2d at 303. The Fifth Circuit has adopted a helpful four-factor test for evaluating such claims: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id.* at 303 n. 8 (adapting the test for pretrial delay announced in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972)); *see also Johnson*, 732 F.2d at 381-82 (adopting *Rheuark* test in a criminal appeal).

[7] Applying these factors here, the leng[illegible] of the delay is three years—a substa[illegible]mount of time. In part the delay ma[illegible] attributable to actions by Antoine's counsel. However, the government does not dispute that a significant portion of the delay—probably at least two years—resulted from the unwillingness or inability of the court reporter to produce the transcript of the trial. Antoine, who requested and paid for a copy of the transcript in a timely manner, cannot be blamed for this delay. We conclude that this second factor also favors Antoine. Further, Antoine vigorously asserted his right to the transcript both before the district court and on appeal.

While the first three factors thus favor Antoine to some extent, evaluation of the fourth factor is more difficult. The Fifth Circuit did not indicate whether its test required the appellant to meet all four prongs, or whether the evaluation entailed a balancing test. *See Rheuark*, 628 F.2d at 303 & n. 8. Nevertheless, we are satisfied that a due process violation cannot be established absent a showing of prejudice to the appellant. Hence, although the first three factors lean towards Antoine, we must also address the fourth.

The Fifth Circuit, again adapting *Barker v. Wingo*, analyzed the prejudice prong by identifying three categories of potential prejudice stemming from a delayed appeal: (1) oppressive incarceration pending appeal, (2) anxiety and concern of the convicted party awaiting the outcome of the appeal, and (3) impairment of the convicted person's grounds for appeal or of the viability of his defense in case of retrial. *Rheuark*, 628 F.2d at 303 n. 8. Although other factors may also be relevant, we believe the Fifth Circuit test is sufficient for this appeal.

We cannot determine factor one. While Antoine has been incarcerated pending appeal, whether this incarceration is unjustified and thus oppressive depends upon the outcome of his appeal on the merits, or subsequent retrial, if any. If his conviction was proper, there has been no oppressive confinement: he has merely been serving his sentence as mandated by law. However, it is impossible to determine on the record before us the lawfulness of Antoine's confinement. Although we reject his Speedy Trial Act claim, the absence of a complete record, or the absence of a reconstructed record that does not specifically prejudice Antoine, would preclude Antoine from discovering whether additional substantive challenges to his conviction can be brought. Determination of prejudice will be made on remand. At this stage of the appeal, however, we cannot determine whether Antoine has suffered from oppressive incarceration.

Antoine has undoubtedly experienced anxiety and concern during the protracted

pendency of this appeal. He has not alleged, however, any particular anxiety suffered here that would distinguish his case from that of any other prisoner awaiting the outcome of an appeal. Thus, we do not conclude that this factor is particularly compelling, although it does weigh slightly in Antoine's favor.

Finally, it is uncertain whether the delay has impaired Antoine's grounds for appeal or may impair his defense in the event of retrial. Again, we do not know whether the delay has impaired his grounds for appeal because at this stage in the proceedings we do not know what all those grounds might be. All we say at this point, not without irony, is that Antoine's appeal on the Speedy Trial Act issue was not impaired by the delay.

The government urges that no impairment in the event of a retrial can be established. In the initial trial, Antoine called no witnesses of his own and offered no evidence; the only defense presentation consisted of recalling one of the government's eyewitnesses to the crime. It is unclear how the passage of time could impair a defense based entirely upon a claim that the government had presented insufficient evidence to carry its burden of proof. Nevertheless, we are reluctant to make this determination as an initial matter. The district judge, who heard the trial, is in a better position to determine the effects of the delay upon a possible retrial. Consequently, we remand to the district court to determine whether the delay has impaired the viability of Antoine's arguments.

As can be seen from this analysis, ruling on the existence of a due process violation presents considerable difficulty. If Antoine has suffered an impairment of his defense in the event of a retrial (a question we leave to the district court), a due process violation may well have occurred. Even if Antoine cannot demonstrate this form of prejudice, he may have suffered unjust confinement if he subsequently brings an appeal and it proves substantively meritorious. Indeed, in such case, a due process violation may have occurred even if Antoine would not be prejudiced in his arguments on appeal or at retrial. As a result, we conclude that it would be premature to rule on the alleged due process violation.

Another factor strongly indicates that a ruling on Antoine's due process claim would be premature. Antoine argues that if a due process violation is found, we should direct the district court to enter a judgment of acquittal. However, ordering an acquittal is not the only or indeed even the usual remedy for a due process violation resulting from the unreasonable delay of an appeal. *See Johnson*, 732 F.2d at 383 (observing that a civil claim under 42 U.S.C. § 1983 or a civil contempt proceeding against parties responsible for the delay could constitute an alternative remedy); *Layne v. Gunter*, 559 F.2d 850, 851 (1st Cir.1977) (where undue delay in state appeals process had resulted in possible denial of due process to petitioner, affirmative relief was inappropriate where state courts had begun processing the appeal), *cert. denied*, 434 U.S. 1038, 98 S.Ct. 776, 54 L.Ed.2d 787 (1978); *Morales Roque v. Puerto Rico*, 558 F.2d 606, 607 (1st Cir. 1976) (when appeal is delayed, release of prisoners being held after conviction for nonbailable offenses is only a last resort). We therefore reject Antoine's request for a direction to the district court.

V

Finally, Antoine argues that the government violated *Brady* by failing to supply him with information regarding a government witness that would have been material to his cross-examination. Antoine filed a motion for a new trial based on the alleged *Brady* violation subsequent to his sentencing. The district court did not rule on this motion. Antoine urges that we treat the district court's failure to rule as a denial of the motion and review the merits of his claim. Because we conclude that it is necessary to remand to the district court for the consideration of other issues, we deem it more appropriate to remand this issue as well. Numerous factual issues surround the *Brady* claim. These issues are best resolved by the district court. Therefore,

19a

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augumented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original [1] orthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) the quantity of transcripts prepared;

(2) the fees charged and the fees collected for transcripts;

(3) any expenses incurred by the reporters in connection with transcripts;

(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

(5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States at not less than $3,000 nor more than $7,630 per annum. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

June 25, 1948, c. 646, 62 Stat. 921; Oct. 31, 1951, c. 655, § 46, 65 Stat. 726; June 28, 1955, c. 189, § 3(c), 69 Stat. 176; June 20, 1958, Pub.L. 85-462, § 3(c), 72 Stat. 207; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; July 1, 1960, Pub.L. 86-568, Title I, § 116(c), 74 Stat. 303; Sept. 2, 1965, Pub.L. 89-163, 79 Stat. 619; Sept. 2, 1965, Pub.L. 89-167, 79 Stat. 647.

[1] So in original.